Supreme Court, U.S.
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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANN HACKLANDER-READY,

Petitioner,

v.

STATE OF WISCONSIN *ex rel.* CARYL SPRAGUE
CITY OF MADISON and CITY OF MADISON
EQUAL OPPORTUNITIES COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the Wisconsin Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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93 pp

QUESTIONS PRESENTED

The city of Madison imposed substantial penalties, pursuant to fair housing laws, on petitioner Ann Hacklander for declining to accept a woman of a different sexual orientation into her shared living arrangement after placing an ad seeking an additional housemate.

I. DOES A CITY ORDINANCE WHICH PROHIBITS AN INDIVIDUAL FROM REFUSING TO ACCEPT ANOTHER INTO A SHARED LIVING ARRANGEMENT BASED ON THE OTHER'S SEXUAL ORIENTATION VIOLATE THE CONSTITUTIONAL RIGHT PROTECTING PRIVACY IN THE HOME?

II. DOES A CITY ORDINANCE WHICH PROHIBITS AN INDIVIDUAL FROM REFUSING TO ACCEPT ANOTHER INTO A SHARED LIVING ARRANGEMENT BASED ON THE OTHER'S SEXUAL ORIENTATION VIOLATE THE CONSTITUTIONAL RIGHT TO CHOOSE WITH WHOM TO ASSOCIATE?

III. DOES THE INTEREST OF GOVERNMENT TO PROVIDE EQUAL ACCESS TO HOUSING JUSTIFY A CITY ORDINANCE WHICH INFRINGES ON CONSTITUTIONALLY PROTECTED RIGHTS OF AN INDIVIDUAL BY PROHIBITING THE INDIVIDUAL FROM DECLINING TO ACCEPT ANOTHER INTO A SHARED LIVING ARRANGEMENT BASED ON THE OTHER'S SEXUAL ORIENTATION?

PARTIES

Maureen Rowe was originally a party to this action as a respondent to the claim. She is no longer a party. All other parties are listed in the caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 4

A. FACTUAL BACKGROUND 4

B. ADMINISTRATIVE PROCEEDINGS AND APPEAL TO CIRCUIT COURT 8

C. APPEAL TO THE WISCONSIN COURT OF APPEALS 9

REASONS FOR GRANTING PETITION 9

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION OF THE COURT BELOW DISREGARDED HACKLANDER'S CONSTITUTIONAL RIGHTS OF ASSOCIATION CONTRARY TO RULINGS OF THIS COURT 10

A. Madison General Ordinance 3.23 which Prohibits Hacklander from Refusing to Accept an Individual into a Shared Living Arrangement Based on the Individual's Sexual Orientation Violates Hacklander's Constitutional Right of Association Where the Shared Living Arrangement Necessarily Involves a very Intimate or Personal Relationship. 11

B. Madison General Ordinance 3.23 Which Prohibits Hacklander from Refusing to Accept a Individual into a Shared Living Arrangement Based on the Individual's Sexual Orientation Violates Hacklander's Constitutional Right of Association where it Interferes with Her Right to Avoid Expression under the First Amendment. 13

II. THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION OF THE COURT BELOW DISREGARDED HACKLANDER'S CONSTITUTIONAL RIGHT OF PRIVACY IN THE HOME AS ESTABLISHED BY RULINGS OF THIS COURT. 15

III. THIS COURT SHOULD GRANT REVIEW TO CLARIFY LAW CONCERNING THE EFFECT OF COMMERCIAL ELEMENTS IN ACTIVITY THAT IS OTHERWISE PROTECTED BY THE CONSTITUTIONAL RIGHTS OF ASSOCIATION AND PRIVACY IN THE HOME. 17

A. Contrary to this Court's Decisions, the Wisconsin Court of Appeals Foreclosed Hacklander's Constitutional Rights of Association because She Required the Prospective Housemate to Share in the Rent. 18

B. Contrary to Decisions of this Court, the Wisconsin Court of Appeals Foreclosed Hacklander's Constitutional Right of Privacy in the Home because She Required the Prospective Housemate to Share in the Rent. 21

IV. THIS COURT SHOULD GRANT REVIEW BECAUSE MGO 3.23 IS PROHIBITED BY THE UNITED STATES CONSTITUTION WHERE IT VIOLATES HACKLANDER'S PROTECTED RIGHTS AND IS UNNECESSARILY BROAD TO PROMOTE THE GOAL OF PROVIDING EQUAL ACCESS TO HOUSING. 22

CONCLUSION 25

APPENDIX

ORDER OF THE WISCONSIN SUPREME COURT 1a

DECISION OF THE WISCONSIN COURT OF APPEALS 2a

DECISION OF THE CIRCUIT COURT AFTER REMAND TO ADMINISTRATIVE LEVEL 12a

DECISION OF THE MADISON EQUAL OPPORTUNITIES COMMISSION ON REMAND FROM CIRCUIT COURT 28a

DECISION OF THE CIRCUIT COURT ON APPEAL FROM DECISION OF THE MADISON EQUAL OPPORTUNITIES COMMISSION 36a

RECOMMENDED FINDINGS OF FACT AND
CONCLUSIONS OF LAW BY THE HEARING
EXAMINER OF THE MADISON EQUAL
OPPORTUNITIES COMMISSION 44a

TABLE OF AUTHORITIES

Cases:

Adler v. Board of Education, 342 U.S. 485, 96 L.Ed.2d 517, 72 S.Ct. 380 (1952). 14

Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987). 10, 11, 12 13, 22

Hurley v. Irish-American Gay Group, 515 U.S. ___, 132 L.Ed.2d 487, 115 S.Ct. 2338 (1995). 13, 14

Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). 23, 24

Konigsberg v. State Bar of California, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961). 23

Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). 15

Roberts v. United States Jaycees, 468 U.S. 609, 82 L.Ed.2d 462, 104 S.Ct. 3244 (1984). 10, 11, 12, 13, 18, 19, 20

Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973). 22, 23

Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). 15, 16

Constitutional and Statutory Authorities:

United States Constitution, Amendment I . . . . . *passim*

United States Constitution, Amendment IV. . . . . *passim*

28 U.S.C. §1257 2

Madison General Ordinance § 3.23 . . . . . 8, 9, 22, 23, 24

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OPINIONS BELOW

The order of the Supreme Court of Wisconsin denying review of the case appears in the Appendix at 1a. The decision of the Wisconsin Court of Appeals appears in the Appendix at 2a. The second decision of the Dane County Circuit Court affirming the Madison Equal Opportunities Commission ruling against Hacklander appears in the Appendix at 12a. The administrative decision on remand from the Dane County Circuit Court appears in the Appendix at 28a. The first decision of the Dane County Circuit Court reversing and remanding decision of the Madison Equal Opportunities Commission appears in the Appendix at 36a. The proposed findings of fact, conclusions of law and order of the initial administrative hearing appears in the appendix at 44a. None of the decisions in this matter have been reported.

JURISDICTIONAL GROUNDS

The Wisconsin Court of Appeals decided this case in conflict with the decisions of this Court concerning the right of association protected by the First Amendment, the right of association which is protected by the penumbra of the Bill of Rights, and the right of privacy in the home protected by the Fourth Amendment. The order of the Supreme Court of Wisconsin denying review in this case was issued on December 17, 1996. Pursuant to 28 U.S.C. §1257 this Court has jurisdiction to review the decision of the Wisconsin Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1) United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2) United States Constitution, Amendment IV:

The right of people to be secure in their persons, houses, papers,and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

3) Madison General Ordinance, Section 3.23:

(1) Declaration of Policy. The practice of providing equal opportunities in housing ... without regard to ... sexual orientation ... is a desirable goal of the City of Madison and a matter of legitimate concern to its government.... In order that the peace, freedom, safety and general welfare of all inhabitants of the City may be protected and ensured, it is hereby declared to be the public policy of the City of Madison to foster and enforce to the fullest extent the protection by law of the rights of all of its inhabitants to equal opportunity to ... housing ....

(2)(b) "Housing" shall mean any building, structure, or part thereof which is used or occupied, or is intended,

arranged or designed to be used or occupied, as a residence, home or place of habitation of one or more human beings, including a mobile home as defined in Section 66.058 of the Wisconsin Statutes and a trailer as defined in Section 9.23 of the Madison General Ordinances... Such definition of "housing" is qualified by the exceptions contained in Section 3.23(4)(a). . .

(4) It shall be an unfair discrimination practice and unlawful and hereby prohibited:

> (a) For any person having the right of ownership or possession or the right of transfer, sale, rental or lease of any housing, or the agent of any such person, to refuse to transfer, sell, rent or lease, or otherwise to deny or withhold from any person such housing because of ... sexual orientation ...
>
> (b) Nothing in this ordinance shall prevent any person from renting or leasing housing, or any part thereof, to solely male or female persons if such housing or part thereof is rented with the understanding that toilet and bath facilities must be shared with the landlord or with other tenants

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

At all times material to the present action, Ann Hacklander-Ready was a single woman. In August, 1987, Hacklander and three friends, Lisa Gregory, Angie Doroff, and Bonnie Brooks rented a home on Lakeland Avenue in Madison,

Wisconsin. App. 45a. Hacklander and only one of the other individuals signed the lease. App. 46a.

The house had four bedrooms, two bathrooms, a living room with a fire place, sun porch, dining room, kitchen, and sauna. App. 45a. Each of the women had a bedroom and shared all of the other rooms. App. 46a.

Hacklander renewed the lease of the house in August, 1988, for another year. App. 46a. In the fall of 1988, Angie Doroff left and Maureen Rowe, who was a friend of Bonnie Brooks, was invited to live in the house. App. 46a. The four women were close friends and got along very well. They were all single and heterosexual. Hacklander, Rowe, and Gregory had completed school and were working and Brooks was in the process of completing school. App. 46a. The women frequently interacted with each other in the home. They ate meals together and shared each other's company in the common areas. They also shared in the chores connected with living in the home. App. 53a.

In April of 1989, Brooks and Gregory obtained employment which required them to move. App. 46a. The timing was such that Hacklander and Rowe did not have friends who were able to move in with them. App. 46a. They decided to advertise to find suitable female roommates. App. 46a.

Hacklander and Rowe had very definite ideas about the type of person they were looking for to share their home. App. 53a. Each previously had unpleasant shared living situations and were cognizant of the tension created in a joint living arrangement when the individuals have incompatible personalities or lifestyles. App. 53a. They did not desire a male roommate. App. 46a. Nor did they desire a female with a boyfriend who would stay at the house regularly. They also did not want an individual with children or smokers, drug users, or

individuals who were into partying. App. 46a. They considered the house their home and haven and wanted an individual compatible with them who would not be a source of tension. App. 53a.

They received numerous inquiries in response to the advertisements. The men who called were told they were looking for female roommates. App. 47a. At least twelve women were interviewed. App. 47a. Rowe and Hacklander were frank about their lifestyles and the type of person they were looking for to share the home. App. 47a. Certain individuals appeared incompatible and were rejected. They rejected a "boring looking business woman" they felt had nothing in common with them and they rejected a woman who appeared to wear her religious beliefs on her sleeve.

Caryl Sprague was one of the individuals responding to the ad. She was interviewed by Hacklander, Rowe and Gregory. Sprague was told about the roommates' lifestyles, boyfriends, habits and expectations concerning a prospective roommate. Sprague described the interview as long and intense. App. 47a. She was told there was another roommate that had to be consulted and that a decision would be reached with input from everyone living in the home. Sprague, who is a lesbian, said nothing about her sexual orientation. App 47a.

After the interview, Gregory told Hacklander and Rowe that she suspected Sprague was homosexual. Rowe and Hacklander dismissed the suspicion feeling they had been so frank with Sprague about their lives that she would have disclosed her sexual orientation if it was different from theirs. App. 47a.

A few days after the interview, Maureen Rowe called Sprague and invited her to live with them. Sprague responded

that she would think about it and would get back to them. App. 47a.

A few days later, Hacklander called Sprague again to determine whether she had made up her mind. App. 47a. In the conversation, Sprague asked Hacklander if a person's sexual orientation would be respected. App. 47a. Hacklander said that they had already discussed whether she was a lesbian and that she did not think it would be a problem. App. 47a. Sprague said she would come the next day with a deposit.

Hacklander told Rowe and Gregory about the conversation with Sprague. She told Rowe that she once had a lesbian roommate who made a pass at her sister. Hacklander said that she had felt that it was like living with a man and that she had always remained fully clothed while the woman was present.

Sprague came the next day to drop off a deposit. Initially, she talked with Rowe and Gregory. Hacklander returned while Sprague was there. App. 48a. On this occasion, there was a discussion about Sprague's sexual orientation. App. 48a. Sprague was asked about her and her friends' feelings about men and whether she would be bothered when boyfriends came over. App. 47a. Sprague said that she was nervous about living with heterosexual women and said repeatedly that she did not want to live there if anyone was uncomfortable with her sexual orientation. App. 47a. Rowe and Hacklander indicated that they had to talk with the new roommate about Sprague's sexual orientation before committing to let her live with them. App. 48a. They accepted a deposit (because Sprague did not want to return again) with the understanding that it would be returned if Sprague did not end up living at the house.

Later that evening, Rowe called Hacklander and told her that she was not comfortable living with a lesbian. App. 48a.

She told Hacklander she felt it would be like living with a heterosexual man and it would infringe on her personal modesty and privacy. Hacklander told Rowe it was important for her to live in a house that was free of stress and tension. They agreed that they would tell Sprague she could not live with them. App. 48a. Rowe called Sprague and informed her of their decision and the deposit was returned.

B. ADMINISTRATIVE PROCEEDINGS AND APPEAL TO THE CIRCUIT COURT

Sprague commenced this case by a complaint alleging that the three females seeking a roommate to share a home violated the city of Madison's Fair Housing Ordinance by declining to share the home with her based on her sexual orientation. App. 2a. The Madison Equal Opportunities Commission (MEOC) held that the city's ordinance did not apply to individuals seeking to share a living arrangement. App. 3a.

The complainant Sprague then filed a writ of certiorari with the Dane county circuit court to appeal the decision of the MEOC. The circuit court reversed the MEOC, holding the ordinance did indeed apply to individuals wishing to share their homes. App. 3a. It remanded the case while retaining jurisdiction. After further proceedings before the MEOC, the circuit court affirmed the finding of a violation of the ordinance and the award of compensatory damages in the amount of $3,300 and attorneys fees. App. 12a, 25a. The issue of whether the ordinance was constitutional under the state and federal Constitutions was presented to circuit court by the respondents. The court declined to hear the issue, however, holding that the respondents had failed to notify the State Attorney General regarding the constitutional issues and this amounted to a fatal (but curable) defect to the claim under Wisconsin law. App. 14a. Therefore, no decision was made at the circuit court level concerning the constitutionality of MGO §3.23.

C. APPEAL TO THE WISCONSIN COURT OF APPEALS

Hacklander appealed the decision of the circuit court and the defect that prevented the claims of constitutional infringments was cured. The Wisconsin Court of Appeals affirmed the decision of the circuit court by holding that the ordinance applied to the shared living arrangement of Hacklander. App. 6a. The court of appeals also addressed the constitutional issues after holding that the defect recognized at the circuit court level had been cured. App. 6a-7a. It was argued to the appellate court that the constitutionally protected rights of association and privacy were unjustifiably violated by the application of the ordinance to Hacklander under both the state and federal constitutions. In response the Wisconsin Court of Appeals stated:

> Appellants gave up their unqualified right to such constitutional protection when they rented housing for profit. The restrictions placed by the Madison City Council on persons who rent housing for profit are not unreasonable and do not encroach upon appellant's constitutional protections. We therefore reject appellants' challenge to the constitutionality of 3.23(4), MGO, as applied.

App. 7a. The Wisconsin Court of Appeals cited no authority to support this holding.

REASONS FOR GRANTING THE PETITION

Petitioner Ann Hacklander seeks review by this Court of a decision by the Wisconsin Court of Appeals upholding a judgment against her for damages and attorney fees pursuant to a Madison city ordinance for declining to accept a lesbian as a housemate. This court should accept this case for review

because it involves fundamental questions concerning an individual's rights of privacy and association implicated when choosing persons with whom to live.

While the purported goal of Madison's ordinance is to prevent discrimination, there is no claim and no evidence in this case that any animus was directed towards any individual or group. Rather, the illegal conduct at issue involves rational and thoughtful decision making processes concerning the lifestyle compatibilities of a potential housemate.

A significant and crucial line must be drawn beyond which the government cannot control one's thoughts, preferences or associations. While the precise placement of that line may have to await other cases, clearly that line is crossed when the government arrogates unto itself the power to dictate how one may choose with whom to associate as living companions in the anticipated privacy of their own homes.

I.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION OF THE COURT BELOW DISREGARDED HACKLANDER'S CONSTITUTIONAL RIGHTS OF ASSOCIATION CONTRARY TO RULINGS OF THIS COURT.

This Court has recognized the constitutional protection of freedom of association in two distinct senses. *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19, 82 L.Ed.2d 462, 104 S.Ct. 3244, *Board of Dirs. of Rotary Intern. v. Rotary Club*, 481 U.S. 537, 544, 107 S.Ct. 1940, 95 L.Ed.2d 474. First, individuals may choose to enter into and maintain certain

intimate relationships and be secure against undue intrusion by the State. *Id.* This protection is derived from the necessity of individual freedom which is central to our constitutional scheme. *Id.* Second, this Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment. *Id.* The Constitution guarantees freedom of association of this second kind as an indispensable means of preserving other individual liberties. *Id.* The *Roberts* decision further added: "[W]hen the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated." *Roberts*, 468 U.S. at 618. The Madison ordinance prohibiting Hacklander from refusing to accept a housemate on the basis of her sexual orientation infringes on Hacklander's protected right of association in both of its forms.

A. Madison General Ordinance 3.23 which Prohibits Hacklander from Refusing to Accept An Individual into a Shared Living Arrangement Based on the Individual's Sexual Orientation Violates Hacklander's Constitutional Right of Association Where the Shared Living Arrangement Necessarily Involves a very Intimate or Personal Relationship.

This Court has recognized that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Rotary International*, 481 U.S. at 545. The test to determine if a relationship requires the constitutional protection of freedom of association was stated in the *Rotary International* decision.

> In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.

Rotary International, 481 U.S. at 546. This Court recognized that although specific relationships such as marriage and the bearing of children have, in the past, been afforded constitutional protection, the Court has not marked the precise boundaries of this type of constitutional protection. *Id.* at 545. Furthermore, this Court in *Rotary International* made it explicit that this constitutionally protected right of association is not restricted to family members. *Id.* Therefore, this Court has expressed a willingness to provide constitutional protection to a variety of intimate relationships in addition to those that are deemed more "traditional".

The criteria set out in *Rotary International* for relationships having constitutional protection are satisfied by Hacklander's relationship with the others in the shared living arrangement. The factors include the size of the group, the purpose of the group, selectivity of its members, and whether others are excluded from critical aspects of the relationship. *Rotary International*, 481 U.S. at 546. Applying each of the criteria to Hacklander's shared living arrangement reveals a degree of intimacy between the members of the shared living arrangement that was contemplated by the *Rotary International* decision to establish a constitutionally protected right of association. Under this test Hacklander would therefore be afforded this constitutional protection.

This Court in *Rotary International* held that the constitutional right of private association is not limited to only the intimate relationships of marriage and family. This case presents an opportunity for this Court to extend this protection to the intimate relationship between individuals who desire to pursue a shared living arrangement.

B. Madison General Ordinance 3.23 Which Prohibits Hacklander from Refusing to Accept an Individual into a Shared Living Arrangement Based on the Individual's Sexual Orientation Violates Hacklander's Constitutional Right of Association where it Interferes with Her Right to Avoid Expression under the First Amendment.

This Court has recognized that the rights derived from the First Amendment imply a "corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. at 622. This means that government interference with the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment. *Board of Dirs of Rotary Int. v. Rotary Club*, 481 U.S. at 548. In *Roberts* specifically, this Court expressed disfavor over government infringement of speech by forcing the association of individuals.

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association plainly presupposes a freedom not to associate.

Roberts, 468 U.S. at 623.

Recently, this Court in *Hurley v. Irish American Gay Group*, 515 U.S. ___, 132 L.Ed.2d 487 (1995), offered a similar analysis applied to the decision of parade organizers to exclude the voice of homosexuals from their parade. This court held that

the decision of the parade organizers was protected by the constitution stating:

> Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.

Hurley, 132 L.Ed.2d at 503 (citations omitted).

The right to associate for expressive purposes was violated by the Madison Ordinance as it was applied to Hacklander's decision not to accept an individual into a shared living arrangement based on individual's sexual orientation. Hacklander's claim of First Amendment infringement must be viewed in light of the rationale of *Hurley* and the statement of *Roberts*: "Freedom of association plainly presupposes a freedom not to associate." It was Hacklander's choice not to live with a homosexual and this choice implicates her lawful expression which is protected by the First Amendment.

It may easily be presumed that simply living with a homosexual may convey an idea that Hacklander may wish to avoid. Whether Hacklander would want to avoid the association to prevent misconceptions by friends or passers by or whether she merely disagrees with homosexuality, it should not matter. Hacklander and those few with whom she lived should be free to deny this association to to avoid the expression which would result. This Court in *Adler v. Board of Education*, 342 U.S. 485, 493, 96 L.Ed.2d 517, 72 S.Ct. 380, stated: "From time immemorial, one's reputation has been determined in part by the company he keeps." This verity should be reason enough to afford Hacklander constitutional protection based on her right to associate or not to associate for expressive purposes.

II.

THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION OF THE COURT BELOW DISREGARDED HACKLANDER'S CONSTITUTIONAL RIGHT OF PRIVACY IN THE HOME AS ESTABLISHED BY RULINGS OF THIS COURT.

The right of privacy in one's home is fundamental. The principle is one of the pillars of our society with its base in the Fourth Amendment. This Court in *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980), described the extent and importance of an individual's liberty in the home and freedom from governmental intrusion there.

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their. . . houses. . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Forth Amendment] stands ***the right of a man to retreat in to his own home and there be free from unreasonable government intrusion***." (emphasis added)

Payton v. New York, 445 U.S. at 589-90. In *Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734, this Court quoted Judge Frank to expound the importance of liberty within the home.

> William Pitt's eloquent description of this right has often been quoted. The late Judge Jerome

> Frank made the point in contemporary language: "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty--worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." United States v. On Lee, 2 Cir., 193 F.2d 306, 315-16 (dissenting opinion).

Silverman, 365 U.S. at 511, n.4. The significance of the Fourth Amendment protection of liberty in the home almost goes without saying. It has become the expectation of citizens in this society which is simply put: in our homes the government can not intrude.

The house that Hacklander lived in when she sought someone to share it with her was undoubtedly her home. It is where she ate, slept, worked and relaxed. If Hacklander chose to accept an individual to share the house that she lived in, this choice would then necessarily be a choice which affected her home. Since this choice about who lives in the home greatly concerns the very nature of the home, this choice must be afforded the constitutional protection elaborated in *Payton* and *Silverman*. A law which regulated the right to choose a housemate in a shared living arrangement must be scrutinized in this constitutional light.

III.

THIS COURT SHOULD GRANT REVIEW TO CLARIFY LAW CONCERNING THE EFFECT OF COMMERCIAL ELEMENTS IN ACTIVITY THAT IS OTHERWISE PROTECTED BY THE CONSTITUTIONAL RIGHTS OF ASSOCIATION AND PRIVACY IN THE HOME.

Arguments were presented to the Wisconsin Court of Appeals that Hacklander's constitutional rights of association and privacy in the home were violated by the enforcement of the city ordinance prohibiting discrimination in housing against her. The court of appeals, however, held there was no need to address the merits of Hacklander's constitutional arguments. Despite their validity, the court held that these constitutional rights are foreclosed by the fact that Hacklander required the new housemate to share in the rent. To the court of appeals, this was a commercial transaction "for profit" that precluded the application of these constitutional rights.

The decision of the court of appeals is quite limited in the analysis of the effect of the shared rent arrangement between the housemates on Hacklander's constitutional rights. The court held that the sharing of the rent was enough commercial activity to preclude Hacklander's constitutional rights but it cited no cases to support this ruling. The court did not even find it necessary to discuss separately the effect of commercial activity on the right of association as opposed to the right of privacy in the home. It made a cursory statement that was uniformly applied to both arguments.

The effect of commercial activity such as this shared rent arrangement on these important constitutional rights asserted by Hacklander is not made clear by decisions of this court.

Although decisions of this Court have held that certain activities that have commercial qualities do not receive constitutional protection, this Court has never held that pecuniary requirements as slight as those found in financial arrangements between housemates precludes the application of the Bill of Rights to these individuals. Nevertheless, a tension is created by the mere mention that those individuals wishing to assert constitutional rights are also involved in a "commercial activity" however slight. This Court should grant certiorari to clarify the law concerning the effect of commercial activity such as that of Hacklander and her housemates on the constitutional rights of association and privacy in the home.

A. Contrary to this Court's Decisions, the Wisconsin Court of Appeals Foreclosed Hacklander's Constitutional Rights of Association because She Required the Prospective Housemate to Share in the Rent.

The law concerning the limits on constitutional rights of association due to the presence of commercial elements in the association is not clear. This Court has sent mixed messages concerning the relevance of commercial activity on the asserted constitutional claims of association. In *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), this court held that the right of association is recognized in two distinct senses: one is the right to engage in certain private or intimate relationships and the other is the right to associate with others for the purpose of expression. *Roberts*, 104 S.Ct. at 3249. The *Roberts* decision defined the criteria to establish both forms of the constitutional right of association but it did not specifically address the effect of a commercial element in either types of association on the constitutional protection.

Although there is ambiguity in this area of law, there is much persuasive authority by this Court to infer that a rent arrangement between housemates does not foreclose the constitutional rights of association. In *Roberts*, both the majority opinion and the Justice O'Connor concurrence offer statements that indicate that this type of association deserves constitutional protection. In *Roberts*, the majority opinion stated:

> . . . we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts, 468 U.S. at 622. Generally, individuals such as Hacklander and her housemates choose to live with each other for every reason listed by the *Roberts* opinion. The *Roberts* opinion specifically includes pursuing an association for an economic end as a valid First Amendment activity. The Constitutional rights asserted by Hacklander and her housemates at least fit under this clear statement. That is, if she and her housemates chose to live with each other only to serve an economic end this would be protected as contemplated by the *Roberts*' decision.

Also supporting Hacklander's position is Justice O'Connor's concurrence in *Roberts*. Justice O'Connor stated:

> No association is likely ever to be exclusively engaged in expressive activities, if only because it will collect dues from its members. . .

Roberts, 468 U.S. at 635 (O'Connor, J. concurring). Sharing in the rent of a house is clearly analogous to collecting dues to sustain an association. Justice O'Connor contemplated this level of commercial activity would be typical to most associations but

it should not work to foreclose the constitutional rights of association. Under the rationale of these statements in both the majority opinion and the concurrence in *Roberts*, this Court can assert that associations such as the one between Hacklander and her housemates are not foreclosed by merely the fact that they share in the rent of the house.

It must also be recognized that this Court's discussion of the effect of commercial activity on the constitutional rights of association has primarily been in the context of expressive association. With regard to the effect of commercial aspects on private or intimate associations there is even less discourse. The Wisconsin Court of Appeals also foreclosed Hacklander's constitutional right of private or intimate association because of the shared rent arrangement.

This aspect of the decision of the court of appeals is problematic in light of the fact that this Court has never denied the right of private association because individuals shared in the pecuniary interests of the association. Furthermore, the results of such a rule of law would be absurd. Husbands and wives would not have the protected right of association because they shared house payments or car payments. Families would not enjoy this constitutional right because members somehow contribute financially to the relationship. The constitutional right of private association should not be affected by the degree of commercial activity in the association. Hacklander's asserted rights of private association should also not be precluded by the sharing of financial responsibilities between the housemates.

The specter of "commercial activity" is bound to cause future injustice similar to that endured by Ann Hacklander as courts foreclose the constitutional rights of association based on minimal pecuniary transactions involved with the association. With a decision in this case, this Court can clarify important law to ensure a more uniform approach in analyzing the relevance of

commercial activity in cases involving claims of the constitutional right of association.

B. Contrary to Decisions of this Court, the Wisconsin Court of Appeals Foreclosed Hacklander's Constitutional Right of Privacy in the Home because She Required the Prospective Housemate to Share in the Rent.

The decision of the court of appeals to deny constitutional protection due to the commercial activity involved was also applied to Hacklander's argument that the city ordinance violated her right of privacy in the home. The court of appeals cited no authority for this position.

Fourth Amendment protections should not be precluded from living arangements such as Hacklander's merely because all of the individuals sharing the home must share in the rent. Hacklander's home is at stake in her transaction with the individual she accepts to share her home. Hacklander's attempt to find a compatible housemate who would also share in the rent should in no way make her home less a home to her. To the Wisconsin Court of Appeals, the arrangement between Hacklander and her housemates to share in the rent makes their home analogous to a boarding house and therefore without constitutional protection. However, Hacklander's home was never open to the public for commercial gain as the court of appeals reasoned. The very private and personal nature of the home is made evident by the intense screening process Hacklander used in her effort to find someone compatible. Fourth Amendment protections should apply to Hacklander because the decision she made to deny an individual into a shared living arrangement involved the privacy of her home. The argument of the court of appeals which denied Hacklander Fourth Amendment protections of privacy in the home based on the rational that Hacklander was

seeking an individual to share in the rent is devoid of justification by either precedent or common sense.

IV.

THIS COURT SHOULD GRANT REVIEW BECAUSE MGO 3.23 IS PROHIBITED BY THE UNITED STATES CONSTITUTION WHERE IT VIOLATES HACKLANDER'S CONSTITUTIONALLY PROTECTED RIGHTS AND IS UNNECESSARILY BROAD TO PROMOTE THE GOAL OF PROVIDING EQUAL ACCESS TO HOUSING.

The Wisconsin Court of Appeals provided no analysis concerning whether or not the objectives of the city were properly served by the application of the ordinance to persons wishing to share their homes. The court's discussion is limited to one sentence:

> The restrictions placed by the Madison City Council on persons who rent housing for profit are not unreasonable and do not encroach upon appellant's constitutional protections.

App. 8a. Without finding an encroachment on constitutional rights, the court of appeals presumably decided there was no need to address the question of what usefulness the ordinance actually had as applied to Hacklander in promoting the goal of the city to provide equal access to housing.

A government regulation that infringes on the constitutionally protected rights of individuals must serve a compelling and legitimate interest. *Roe v. Wade*, 410 U.S. 113, 155, 35 L.Ed.2d 147, 93 S.Ct. 705, *Board of Dirs. of Rotary International v. Rotary Club*, 481 U.S. 537, 549, 107 S.Ct.

1940, 95 L.Ed.2d 474 (1987). The regulation also must not be over broad or vague to serve the compelling interest. *Keyishian v. Board of Regents*, 385 U.S. 589, 602, 87 S.Ct. 675 (1967). It must be narrowly tailored to be the most restrictive means to accomplish the objectives of the regulation. *Roe v. Wade*, 410 U.S. at 155, *Keyishian*, 385 U.S. at 602. A court will balance a State's interest in maintaining the regulation with the constitutional rights deprived of individuals by the regulation to determine the propriety of the constitutional violation. *Konigsberg v. State Bar of California*, 366 U.S. 36, 51, 6 L.Ed.2d 105, 81 S.Ct. 997 (1961).

The city of Madison's objective by MGO §3.23 is to promote equal access to housing in the city of Madison by preventing the discrimination in housing. The application of the ordinance to individuals such as Hacklander who wish to share their living arrangements clearly amounts to an infringement of the constitutional rights of these individuals. The city, therefore, must establish that the application of the ordinance to individuals in shared living arrangements is required to promote these compelling objectives to justify the constitutional infringements. Furthermore, the city must establish that the ordinance is not too broad to serve these objectives. That is, the law must be narrowly tailored to be the least restrictive of individuals' constitutional rights in light of the underlying objectives.

Balancing the competing interests reveals that the application of the Madison ordinance to individuals who wish to share their own homes is an unwarranted constitutional violation. The objective of the ordinance is to prohibit the discrimination in housing in order to give all individuals equal access to housing. MGO §3.23(1). This goal is well served by the regulation's application to typical landlords who are not renting their own homes. This would cover the vast majority of renting transactions and the constitutional rights of these landlords would not be violated. However, when it is also applied to

tenants who wish to share their homes it becomes an onerous infringement on constitutional rights of these tennants while only minimally promoting the government objective. That is, the objective of the city of Madison is least served where the regulation is most violative of the constitutional rights of individuals such as Hacklander. This Court in *Keyishian*, 385 U.S. at 602, stated:

> . . . [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

The violation of Hacklander's fundamental liberties must be examined under this rationale. If the ordinance were only applied to landlords who rent housing separate from their homes, it would serve the objective of the city to nearly the same degree and would not necessitate the infringements of constitutional freedoms.

The ordinance as it was applied to Hacklander regulates individuals in their homes and regulates with whom these same individuals can associate while only minimally advancing the objective of the law. In this regard the Madison ordinance must be construed as an overbroad and unnecessary infringement on of the constitutional rights of individuals wishing to share the homes that they rent. Madison General Ordinance 3.23(4) is, therefore, an unwarranted violation of Hacklander's constitutional rights of privacy and association and as it is applied to her and other individuals in shared living arrangements it is prohibited by the United States Constitution.

CONCLUSION

For these reasons, petitioner Ann Hacklander asks this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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March 12, 1997.

APPENDIX

SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN
ex rel. CARYL SPRAGUE,
Petitioner-Respondent,

v.

CITY OF MADISON and
CITY OF MADISON EQUAL
OPPORTUNITIES COMMISSION,
Respondents-Respondents,

ANN HACKLANDER-READY,
Respondent-Appellant,

MAUREEN ROWE,
Respondent.

December 17, 1996

No. 94-2983

ORDER

A petition for review pursuant to Wis. Stat. §808.10 having been filed on behalf of respondent-appellant-petitioner, Ann Hacklander, and is considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

WISCONSIN COURT OF APPEALS DECISION

STATE OF WISCONSIN
ex rel. CARYL SPRAGUE,
Petitioner-Respondent,

v.

CITY OF MADISON and
CITY OF MADISON EQUAL
OPPORTUNITIES COMMISSION,
Respondents-Respondents,

ANN HACKLANDER-READY,
Respondent-Appellant,

MAUREEN ROWE,
Respondent.

No. 94-2983.

Wisconsin Court of Appeals,
District IV.
September 26, 1996.

Before Dykman, P.J., Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

SUNDBY, J.

Ann Hacklander-Ready and Maureen Rowe appeal from a decision affirming the Madison Equal Opportunity Commission's (MEOC) Decision and Order which found that they refused to rent housing to Carol Sprague as their housemate because of her sexual orientation, in violation of

§3.23(4)(a) of the Madison General Ordinances (MGO). MEOC awarded Sprague $3,000 in damages for emotional distress, and $300 for the loss of a security deposit on another apartment. We conclude that the trial court correctly found that 3.23, MGO, unambiguously applied to housemates at the time this action arose. We therefore affirm MEOC' saward of damages for Sprague's loss of her security deposit. However, we reverse the award for emotional distress because we conclude that MEOC had no power to award such damages. We further affirm MEOC's award of costs and reasonable attorney's fees to Sprague. Although Sprague is not entitled to damages for emotional distress, she is the prevailing party because she established that appellants discriminated against her.

BACKGROUND

At all times relevant to this action Hacklander-Ready leased a four bedroom house. She had the owner's permission to allow others to live with her and share in the payment of rent. In the fall of 1988, Maureen Rowe began living with Hacklander-Ready and paying rent. In April 1989 they advertised for housemates to replace two women who were moving out. They chose Sprague from among numerous applicants. They knew her sexual orientation when they extended their offer to her. Sprague accepted their offer and made a rent deposit on May 4, 1989. However, the following day Hacklander-Ready informed Sprague that they were withdrawing their offer because they were not comfortable living with a person of her sexual orientation.

Sprague filed a complaint with MEOC alleging that appellants discriminated against her on the basis of sexual orientation, contrary to §3.23(4)(a), MGO. The administrative law judge agreed and awarded Sprague $2,000 for emotional distress, $1,000 punitive damages, and $300 for

the security deposit she lost trying to secure another apartment, together with costs and reasonable attorney's fees. Appellants appealed to MEOC. On July 10, 1992, MEOC vacated the hearing examiner's Findings of Fact and Conclusions of Law and Order on the grounds that the Madison City Council (City Council) intended to exempt roommate arrangements from the ordinance. MEOC did not state its reasons for this conclusion, nor did it address the legal arguments the parties raised.

Sprague petitioned the circuit court for a writ of certiorari to review MEOC's decision. She argued that the ordinance unambiguously applied to housemate arrangements. On August 19, 1993, the trial court reversed MEOC's order. The court found that the language of the ordinance was "crystal clear" and that MEOC had jurisdiction to provide Sprague with relief. The trial court retained jurisdiction and remanded the matter to MEOC. On February 10, 1994, MEOC issued a Decision and Order on Remand which affirmed, in part, the decision of the hearing examiner. MEOC reversed the hearing examiner's award of punitive damages but increased the award of damages for Sprague's emotional distress to $3 000. The total award remained $3,300. MEOC awarded Sprague costs and reasonable attorney's fees.

APPLICABLE ORDINANCES

At the time of the events in issue, §3.23, MGO, provided:

> (1) Declaration of Policy. The practice of providing equal opportunities in housing ... without regard to ... sexual orientation ... is a desirable goal of the City of Madison and a matter of legitimate concern to its government ...

In order that the peace, freedom, safety and general welfare of all inhabitants of the City may be protected and ensured, it is hereby declared to be the public policy of the City of Madison to foster and enforce to the fullest extent the protection by law of the rights of all its inhabitants to equal opportunity to ... housing....

(2)(b) "Housing" shall mean any building, structure, or part thereof which is used or occupied, or is intended, arranged or designed to be used or occupied, as a residence, home or place of habitation of one or more human beings, including a mobile home as defined in Section 66.058 of the Wisconsin Statutes and a trailer as defined in Section 9.23 of the Madison General Ordinances.... Such definition of "housing" is qualified by the exceptions contained in Section 3.23(4)(a).

(4) It shall be an unfair discrimination practice and unlawful and hereby prohibited: (a) For any person having the right of ownership or possession or the right of transfer, sale, rental or lease of any housing, or the agent of any such person, to refuse to transfer, sell, rent or lease, or otherwise to deny or withhold from any person such housing because of ... sexual orientation.... (b) Nothing in this ordinance shall prevent any person from renting or leasing housing, or any part thereof, to solely male or female persons if such housing or part thereof is rented with the understanding that toilet and bath facilities must be shared with the landlord or with other tenants.

DECISION

On certiorari we review the decision of the administrative agency. *State ex rel. Thompson v. Nash*, 27 Wis.2d 183, 194, 133 N.W.2d 769, 775 (1965). Our review is limited to (1) whether MEOC kept within its jurisdiction, (2) whether it acted according to the law, (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment, and (4) whether the evidence was such that MEOC might reasonably have made the order or determination in question. *Marris v. City of Cedarburg*, 176 Wis.2d 14, 24, 498 N.W.2d 842, 846 (1993).

Sprague claims that 3.23, MGO, was intended to apply to housemate arrangements.[1] The interpretation of a statute or ordinance is a question of law which we decide without deference to the trial court. *Id.* at 32, 498 N.W.2d at 850. Where a statute is unambiguous there is no need to go beyond the clear language of the statute. *County of Sauk v. Trager*, 113 Wis.2d 48, 55, 334 N.W.2d 272, 275 (Ct. App. 1983), aff'd 118 Wis.2d 204, 346 N.W.2d 756 (1984).

Section 3.23(4), MGO, unambiguously prohibits any person having right of rental to refuse to rent to any person because of the person's sexual orientation. Hacklander-Ready concedes that she held the lease to the house and that she had the right to rent the property to others. Further, she and Rowe admit that the sole reason they withdrew their offer

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[1] In September 1989, subsequent to the commencement of this action, the Madison City Council amended the Equal Opportunities Ordinance by adding § 3.23(c), MGO, which states, "Nothing in this ordinance shall affect any person's decision to share occupancy of a lodging room, apartment or dwelling unit with another person or persons."

was Sprague's sexual orientation. Finally, the room that appellants sought to rent falls within the definition of housing under §3.23(2)(b), MGO, as a part of a building intended as a place of habitation for one or more human beings.

While appellants correctly argue that a statute is ambiguous if it may he construed in different ways by reasonably well-informed persons, we fail to see any reasonable interpretation that would make §3.23, MGO, inapplicable in this case. See *La Crosse Footwear v. LIRC*, 147 Wis.2d 419, 423, 434 N.W.2d 392. 394 (Ct. App. 1988). Appellants also correctly note that a court may resort to construction if the literal meaning of a statute produces an absurd or unreasonable result. *NCR Corp. v. Department of Revenue*, 112 Wis.2d 406, 411, 332 N.W.2d 865, 868 (Ct. App. 1983). However, applying §3.23(4) to the rental of a room within a house with shared common areas is not unreasonable or absurd. Because we find that the ordinance clearly and unambiguously applies to the subleasing of housing by a person having the right of rental, our inquiry in this respect is at an end.

Appellants argue that to apply the ordinance to the lease of housing by a tenant to a housemate makes §3.24(4)(a), MGO, unconstitutional in its application. The trial court properly declined to consider this argument because appellants failed to notify the attorney general of their challenge, as required by §806.04(11), STATS.[2] However, appellants notified the attorney general subsequent

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[2] Section 806.04(11), STATS., provides: "In any proceeding which involves the validity of a municipal ordinance or franchise ... if any ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to he heard."

to the trial court's decision.[3] This notice cured the defect. See *In re Estate of Fessler*, 100 Wis. 2d 437, 444 , 302 N.W. 2d 414, 418 (1981).

Appellants cite many cases which they argue support their constitutional challenge: *NAACP v. Alabama*, 357 U.S. 449 (1958): *Griswold v. Connecticut*, 381 U.S. 479 (1965); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); Payton v. New York, 445 U.S. 573 (1980); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *City of Wauwatosa v. King*, 49 Wis.2d 398, 182 N.W.2d 530 (1971). However, those cases deal either with the right to privacy in the home or family or the right to engage in first amendment activity free of unwarranted governmental intrusion. Appellants gave up their unqualified right to such constitutional protection when they rented housing for profit. The restrictions placed by the Madison City Council on persons who rent housing for profit are not unreasonable and do not encroach upon appellant's constitutional protections. We therefore reject appellants' challenge to the constitutionality of §3.24, MGO, as applied.

Appellants next argue that MEOC exceeded its jurisdiction when it awarded Sprague damages for emotional distress. MEOC relies on §3.23(9)(c)2.b, MGO, as the source of its authority to make such an award. At the time this action arose, §3.23(9)(c)2.b, MGO, stated that when MEOC determines that discrimination has occurred "it shall order such action by the Respondent as will redress the injury done to the Complainant in violation of this ordinance ... and generally effectuate the purpose of this ordinance." Whether this language empowered MEOC to award damages is again a question of law which we decide without deference to the trial court's decision. *Marris*, 176 Wis.2d at 24, 498 N.W.2d

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[3] The attorney general declined to appear in this matter.

at 846. In construing a statute or ordinance, we seek the intent of the legislative body. *Watkins v. LIRC*, 117 Wis.2d 753, 761, 345 N.W.2d 482, 486 (1984).

As remedial legislation, §3.24, MGO, must be liberally construed to accomplish its purpose. MEOC has awarded damages for emotional distress in two previous cases[4], however, this brief history is not sufficient to persuade us to defer to the agency's interpretation without our own careful examination. We need not give deference to an administrative agency's interpretation of a statue or ordinance unless the agency's interpretation has been long-continued, substantially uniform and without challenge by governmental authorities and courts. *Local No. 695 v. LIRC*, 154 Wis.2d 75, 83, 452 N.W.2d 368, 372 (1990).

Section 3.23, MGO, as it read when this dispute arose, did not explicitly authorize MEOC to award compensatory or punitive damages. Moreover, when this action arose not even the State's Fair Housing Law allowed the administrative agency to award damages in an administrative proceeding. Such damages could be awarded only in a civil action. Section 101.22(7), STATS.[5] Further, when this action arose, §66.432(2), STATS., which enables municipalities to enact ordinances prohibiting discrimination in the rental of housing, only authorized them to impose forfeitures.[6] Without such statutory authority, it is extremely

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[4] *Nelson v. Weight Loss Clinic of America*, case No. 20684 (9 / 29 / 89), and *Ossia v. Rush*, case No. 1377 (6 / 7 / 88).

[5] Section 101.22, STATS., was amended in 1993 to permit a hearing examiner to award economic and non-economic damages, and was renumbered to §106.04 by 1995 Act 27, § 3687.

[6] Even the present version of §66.432(2), STATS., does not specifically authorize a municipal agency to award damages to redress

unlikely that the City Council intended to empower MEOC to award compensatory damages. Finally, the plain language of §3.23, MGO, that the agency "shall order such action by the Respondent as will redress the injury done to the Complainant ... and generally effectuate the purpose of this ordinance," is far more consistent with the imposition of forfeitures and equitable relief. We also note that the City Council has now amended §3.23, MGO, to explicitly grant MEOC authority to award economic and non-economic damages. Section 3.23(9)(c)5b, MGO. That the City Council added this language after this action was begun is strong evidence that the Council did not consider that the former language of §3.23(4) empowered MEOC to award compensatory damages. See Sutherland, STAT. CONSTR. §48.01 (5th Ed.). We therefore hold that MEOC exceeded its jurisdiction and acted contrary to law when it awarded Sprague damages for emotional distress.[7]

Appellants also argue that the $300 award for the lost security deposit should be vacated because it reflects MEOC's will and not its judgment. However, we find that MEOC's determination that appellants' illegal refusal to rent to Sprague was the proximate cause of the lost security deposit is reasonably supported by the evidence and is an appropriate restitutionary remedy.

Finally, appellants contend that Sprague's inquiries as to whether the household would respect her sexual orientation constituted a waiver of her rights under §3.23, MGO. To hold that a prudent inquiry about the environment

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housing discrimination. Rather it provides for either party to elect to remove the action to the circuit court after a finding has been made that there is reasonable cause to believe that a violation has occurred.

[7] Sprague does not contest MEOC's decision which deleted the examiner's proposed award of punitive damages.

in which one will live waived the protections afforded by §3.23, MGO, would be an unreasonable construction of the ordinance. We therefore hold that by her inquiries Sprague did not waive her rights under the ordinance.

Because we hold that in enacting §3.23(9)(c)2.b, MGO, the Common Council did not authorize MEOC to award damages for emotional distress, we do not decide whether the award violated appellants' right to a jury trial. Further, we need not consider the broader question whether municipalities generally have the power to authorize administrative agencies to award compensatory damages.

By the Court - Order affirmed in part and reversed in part.

STATE OF WISCONSIN
CIRCUIT COURT FOR
DANE COUNTY

BRANCH 16

STATE OF WISCONSIN
ex. rel. CARYL SPRAGUE

Plaintiff,

vs .

CITY OF MADISON AND
CITY OF MADISON EQUAL
OPPORTUNITIES COMMISSION

Defendants.

Case No. 93 CV 113

Respondents Ann Hacklander-Ready and Maureen Rowe bring this action for Writ of Certiorari to review a decision of the City of Madison Equal Opportunities Commission (MEOC) on remand from an Order of this Court.

This case first came before this court on an issue of statutory construction. Initially a hearing examiner for the MEOC concluded that "Respondents discriminated against the Complainant in rental housing when they withdrew their offer to rent a room to her in a rented house because of her sexual orientation in violation of §3.23(4)(a), MGO." The recommended order included provisions for payment of a

total of $3,300 damages to the Complainant, together with costs and reasonable attorney's fees. Of the total $3,300 damages awarded, $300.00 was awarded for the loss of Complainant's security deposit, $2,000 was awarded for emotional distress, and $1,000 was awarded as punitive damages. The Respondents appealed to the Equal Opportunities Commission. On July 10, 1992, the Commission vacated the hearing examiner's recommended Findings of Fact, Conclusions of Law, and Order by finding that the ordinance in effect at the time in question was inapplicable because "roommate transactions were intended to be exempted from coverage under the Ordinance." In response to this ruling, Petitioner filed an acting for certiorari before this court.

In a decision dated August 19, 1993, this court held that Madison General Ordinance §3.23 was not ambiguous and that its terms clearly encompassed the rental arrangement which is the central focus of this action. In the Order, this court remanded the case to the Commission to further consider Respondents' remaining exceptions to the order of the hearing examiner which had-not been reached by the Commission.

In a Decision and Order on Remand dated February 10, 1994, the Commission considered Respondents' exceptions and affirmed, in part, the decision of the hearing examiner. However, the Commission reversed the hearing examiner's award of punitive damages and increased the award of damages for emotional distress to $3,000. The total award to Petitioner for compensatory damages remained at $3,300. Respondents Hacklander-Ready and Rowe now seek judicial review of the Commission's Decision and Order on Remand.

STANDARD OF REVIEW

On certiorari, the reviewing court is limited to determining: (1) Whether the agency kept within its jurisdiction; (2) Whether the agency acted according to law; (3) Whether the agency's action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) Whether the evidence presented was such that the agency might reasonably make the order or determination in question. State ex ref. *Whiting v. Kolb*, 158 Wis. 2d 226, 233 (Ct. App. 1990).

On review by certiorari, the court must uphold an agency decision if it is supported by "any reasonable view of the evidence." *Nufer v. Village Bd. of Village of Palmyra*, 92 Wis. 2d 289, 301 (1979). Thus, the court will not review the weight and credibility of the evidence but must affirm if any reasonable view of the evidence supports the agency's decision. *State ex ref. Beierle v. CSC* , 41 Wis. 2d 213 (1969).

DISCUSSION

Respondent presents several exceptions to the Commission's Decision and Order on Remand.

I. Constitutionality of §3.23(4)(a) MGO

Respondents contend that §3.23(4)(a), MGO raises constitutional concerns regarding the right to privacy and the right of association. This argument goes directly to the validity of that section of the ordinance.

Section 806.04(11), Stats. provides in relevant part that, "In any proceeding which involves the validity of a municipal ordinance or franchise. . .if the. . .ordinance is

alleged to be unconstitutional, the attorney general shall be so served with a copy of the proceeding and be entitled to be heard." §806.04(11), Stats. This requirement is not only mandatory but is fatal to the jurisdiction of the court to consider the constitutional issue raised. *Matter of Fessler's Estate*, 100 Wis. 2d 437 (1981).

There is no record in this case that Respondents have notified the attorney general of their constitutional challenge to this ordinance. Respondents raised this same argument in 1991 before the Commission in their Answer and Brief and still failed to notify the attorney general of their constitutional challenge. Respondents contend that this requirement is not applicable since this is not an action for declaratory relief. Contrary to Respondents assertion, case law clearly indicates that even when the action is not one for declaratory judgment and the constitutionality of a statute is raised by way of a defendant's demurrer, the requirement of §806.04(11), Stats. for service on the attorney general is applicable. Absent such service, the trial court cannot properly consider the constitutional issue because failure to give notice is fatal to the jurisdiction of the court. *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 116-17 (1979).

While this court recognizes that failure to notify the attorney general is a curable defect (See *W.W.W. v. M.C.S.*, 161 Wis. 2d 1015 (1991)), this court declines to allow Respondents the opportunity to do so based on the history of this case. The complaint to the EOC in this case was filed nearly 51/2 years ago on 5/25/89. The ordinance being challenged is no longer on the books, having been modified by City Council action after the complaint in this action was filed. The decision of this court, therefore, would have applicability to only the parties to this action. This matter has been under litigation for over 5 years and must be finally determined. Further delay would not serve the interests of

justice or the interests of the parties to this action. Respondents have raised this constitutional argument since 1991 and still have failed to notify the attorney general. The requirements of the statute are clear and the case law requiring notice even in non-declaratory judgment actions is not new. The decisions on this issue date from the *Kurtz* decision in 1981. Respondent has had ample opportunity to comply with the statute. This court's refusal to allow Respondent time to give notice at this date is supported by case law. See *Midwest Mut. Ins. Co. v. Nicolazzi*, 138 Wis. 2d 192, 202 (Ct. App. 1987) where the Court of Appeals declined to allow notification of the attorney general on appeal "under the history of this case."

Because Respondents have failed to comply with the requirements of §806.04(11), Stats., this court lacks jurisdiction to consider Respondents' constitutional challenges.

II. Waiver of Violation of Ordinance

Respondents maintain that Complainant waived any claim of violation of the ordinance by virtue of the fact that she "repeatedly said that she did not want to live in the house if anyone was uncomfortable." (Respondent's Brief, p.2). According to Respondents, this expression amounted to an invitation to Respondents to reject her if they were not comfortable with her sexual orientation. Respondents contend that Complainant should not be allowed to sue Respondents once she had made such an invitation.

Complainant denies that she told Respondents that she would not live in the home if they felt uncomfortable living with a lesbian. Complainant maintains that she asked generally whether a person's sexual orientation would be respected within the house.

In her proposed Findings of Fact, the Hearing Examiner states, "The Complainant mentioned to the Respondents that she would not wish to live in a house in which a person's sexual orientation is not respected." The Hearing Examiner did not specifically address in her conclusions of law whether this finding of fact constituted a waiver or abandonment of any claim of discrimination. However, the Hearing Examiner did find that considering all of the evidence before her Respondents did, in fact, discriminate against Petitioner based on her sexual orientation. The Commission, on remand, stated that, "The Hearing Examiner has the discretion to articulate those parts of the record she deems relevant as she renders her findings, conclusions, and order."

This court must uphold the agency's decision if it is supported by any reasonable view of the evidence. *Nufer v. Village Bd. of Village of Palmyra*, 92 Wis. 2d 289, 301 (1979). When the record reveals conflicting views which may each be sustained by the evidence, the court is not to substitute its judgment for the judgment of the Commission. It is for the agency to decide which view of the evidence it wishes to accept. *Sanitary Transfer & Landfill. Inc. v. Department of Natural Resources*, 85 Wis. 2d 1 (1978). An agency's findings on disputed evidence are conclusive even if a court might have ruled differently. It is only when the agency's findings are incredible as a matter of law that a reviewing court will reverse the agency findings. *Advance Die Casting Co. v. Labor and Industry Review Com'n.*, 154 Wis. 2d 239, review denied 454 N.W.2d 806 (Ct. App. 1989).

The agency, in the case before this court, has weighed the testimony and stated in its Findings of Fact that Sprague did mention she would not want to live in the apartment if the other roommates would be uncomfortable. However, even

considering this finding, the agency determined that Respondents discriminated against Complainant on the basis of her sexual orientation. This court finds there was more than sufficient evidence presented to support the agency's determination. In finding that Respondents discriminated against Complainant based on her sexual orientation, the agency must have concluded that Complainant did not waive her claim. Respondents have cited no authority for the proposition that a claim for discrimination may be waived by a victim by articulating concerns about respect for her sexual orientation. Such a view would be contrary to the spirit and purpose of housing discrimination laws.

For all of the reasons stated above, this court finds that the evidence was such that the Commission might reasonably reach its conclusion that Ms. Sprague did not waive her right to be free from discrimination in housing.

III. Damages for Emotional Distress

Respondents also take exception to the Commission's award of damages for emotional distress and punitive damages. Respondents maintain that the ordinance does not authorize the Commission to award damages either for emotional distress or punitive damages. Respondent further maintains that if the ordinance is construed to provide for such damages it then violates Respondents' right to a jury trial.

As a preliminary matter, because the Commission on remand denied the award of punitive damages the question as to MEOC's authority to award punitive damages is now moot.

The MEOC bases its authority to award damages for emotional distress on the broad powers granted to the

Commission when it finds that discrimination has occurred. Under §3.23(9)(c)2.b. the Commission "shall order such action by the Respondent as will redress the injury done to the Complainant in violation of the ordinance..." The Commission is also empowered to "adopt such rules and regulations as may be necessary to carry out the purpose and provisions of this ordinance." §3.23(9)(b)6., MGO. EOC Rule 17, adopted by the Commission, expressly authorizes compensatory damages for discrimination:

> Compensatory losses, reasonable attorney fees and costs may be ordered along with any other appropriate remedies where the Commission finds that a Respondent has engaged in discrimination.
>
> This rule does not-by express reference to compensatory losses, attorney fees and costs-limit in any way the Commission's authority to order any other remedies permitted or required under §3.23, Madison General Ordinances.

The Commission has interpreted this language to permit awards for emotional distress in previous MEOC decisions - *Nelson v. Weight Loss Clinic*, No. 20684 (Sept. 29, 1989) and *Ossia v. Rush*, No. 1377 (June 7, 1988). Both of these decisions base their reasoning on: (1) the City's authority under its home rule powers to authorize relief which would make a complainant whole for all losses and expenses including compensatory damages and, (2) a similarity in purpose and objective to the Wisconsin Open Housing Law, §101.22, Stats under which case law has approved awards of damages for emotional distress.

Respondents contend that a comparison of §3.23, MGO to §101.22, Stats. is inappropriate because the State Open Housing Law contains remedy language which is

significantly more specific and expressly allows for damages while the Madison General Ordinance does not. Respondents conclude that because there is no specific remedy language as in the State Open Housing Law, the ordinance must be intended only to provide a make-whole remedy.

This court is unpersuaded by Respondents' arguments. The City Council clearly granted the Commission broad powers to remedy incidents of housing discrimination and to promulgate rules to enforce that power. The Declaration of Policy in §3.23(1), MGO expresses the important and serious public policy concerns of the City Council in providing citizens with fair and equal opportunity in housing. This Declaration of Policy emphasizes that it is the policy of the City to enforce equal housing opportunity for all Madison residents to the fullest extent of the law. As remedial legislation, this ordinance must be liberally construed to effectuate this purpose.

The crucial language is found in §3.23(9)(c)2.b., MGO which provides that the Commission shall order such action as will "redress the injury done to the Complainant." When read in conjunction with the liberal construction of the Declaration of Policy to enforce equal housing opportunity to the fullest extent of the law it is reasonable to conclude that the Commission could interpret its authority to allow for not only compensatory losses but also any other remedy permitted or required under the ordinance (EOC Rule 17). Furthermore, the ordinance can reasonably be interpreted to allow for remedies which address not only the practices of discrimination in housing but also the effects of discrimination in housing.

This conclusion is further supported by the fact that Wisconsin courts have long recognized that emotional distress may be the [illegible] proximate and natural result of an

infringement of a legal right - especially the right to not be discriminated against in housing matters. In *Chomicki v. Wittekind*, 128 Wis. 2d 188 (Ct. App. 1985), the court awarded damages for emotional distress under Wisconsin's Open Housing Law, §101.22, Stats. and found that the intent of the legislature in rendering housing discrimination unlawful was to protect human dignity and human rights. Where the intent of the Madison General Ordinance is to enforce equal housing opportunity to the fullest extent of the law and to redress the injury done to Complainants, the award of damages to compensate for a victim's humiliation is an act reasonably calculated to eliminate the effects of discrimination.

Furthermore, the City Council was not limiting in specifying the types of injuries the Commission can redress in enforcing violations of the ordinance. Wisconsin courts recognize the emotional damage incurred by those subjected to discrimination in housing. It is black letter law that compensatory damages awards are intended to make injured parties whole when the injury consists of emotional distress. *Memphis community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986). Also, it is widely recognized that in many housing cases, "out-of-pocket expenses are de minimis." *Walnut Creek Manor v. FEHC*, 814 P. 2d 704,726 (Cal. 1991) citing Private Enforcement and Fair Housing. supra. 6 Yale L. & Pol'y Rev. 375, 380. To deny the Commission the authority to award compensatory damages for emotional distress would essentially end in a result in which the complainant would not be made whole. The complainant might only be compensated for minor economic losses yet incur significant noneconomic injury. The case before this court is an example of such a dilemma where the award of compensatory damages for emotional harm may be the only significant remedy available to a victim of discrimination. While here, the Complainant did lose a $300 security deposit,

other victims of housing discrimination might find alternative housing with cheaper rent and consequently have no economic loss. An interpretation of the ordinance allowing no recovery in such cases cannot possibly serve the strong public policy goals of the ordinance.

Finally, an interpretation of the ordinance which deprives the Commission of the authority to award damages for emotional distress destroys the effectiveness of the Commission as an aggressive enforcement mechanism for remedying acts of unlawful housing discrimination. If the Commission is denied the ability to offer meaningful compensation to a claimant, there is little incentive to pursue a claim of discrimination and victims would be influenced to forego their claims. This weakens the enforcement scheme devised by the City Council. The ability to compensate victims for emotional distress supports and reinforces the City's goal of providing equal access to available housing in the City.

For all of these reasons, this court concludes that the Commission did not act beyond its authority or contrary to law in awarding damages for emotional distress.

IV. Right to Jury Trial

Respondents further maintain that if the Commission is authorized to award damages this violates their right to a jury trial pursuant to the Wisconsin Constitution, Article I, §5 and pursuant to the Seventh Amendment of the United States Constitution.

The right to a jury trial under the Seventh Amendment applies to actions in federal court. It does not apply to state proceedings since the Seventh Amendment has not been incorporated by the Fourteenth Amendment to become

binding on the states. *State v. Ameritech Corp.*, Case No. 93-1750 (Ct. App. June 28, 1994). Thus, the analysis stops here and there is no need to address further arguments.

The right to a jury trial pursuant to Article I, §5 of the Wisconsin Constitution extends to "all cases at law." The long-standing interpretation of this language is that "at law" applies only to rights which existed under common law at the time the Wisconsin Constitution was enacted. The Wisconsin Constitution was enacted in 1848. *Ameritech*, supra. and *N.E. v. DHSS*, 122 Wis. 2d 198, 203 (1985). Here, protection of individuals from the effects of discrimination on the basis of sexual orientation is a relatively new function of government. Discrimination of all types was generally not prohibited at the time the Wisconsin Constitution was enacted. Nor can complainant's claim be characterized as a common law tort claim for personal injury as this argument was expressly rejected in *Chomicki v. Wittekind*, 128 Wis. 2d 188, 199 (Ct. App. 1985).

This interpretation of the right to a jury trial under the Wisconsin Constitution has been supported in another case involving a money award by an "antidiscrimination" commission. In *General Drivers & Helpers Union v. WERB*, 21 Wis. 2d 242 (1963) the court determined that the right to obtain redress for unfair labor practices did not exist at the time the Wisconsin Constitution was enacted and, therefore no right to a jury trial existed in an unfair labor practice case.

Finally, the City of Madison correctly points out that a constitutional right to a jury trial does not apply to violations of municipal ordinances except where there is a statutory provision for jury trial. *Village of Menomonee Falls v. Michelson*, 104 Wis. 2d 137, 146 (Ct. App. 1981). There is no state statute granting the right to a jury trial for violations of §3.23, MGO.

For all of these reasons, this court concludes that the Commission did act according to law and within its jurisdiction in awarding compensatory damages for emotional distress without a jury trial.

V. Damage Award Supported by the Evidence

Respondents challenge the sufficiency of the evidence in support of the Commission's findings on damages. This court's review of this challenge is limited. We accept findings of fact made by an administrative agency if they are supported by the record. *Nelson Bros. Furn. Corp. v. Department of Revenue*, 152 Wis. 2d 746, 753 (Ct. App. 1989). In the case before this court, the Commission awarded Complainant $300.00 for the loss of a security deposit on another apartment. The Commission affirmed the award noting that the record was well established to support the conclusion that but for the discrimination by Respondents, Complainant would not have had to seek out other living arrangements. This court agrees that there is ample evidence in the record to support the Commission's conclusion that the loss of the security deposit was a direct result of Respondents' discrimination. In addition, this was the one expense incurred which was documented by records. Therefore, this court concludes that the Commission's conclusion was reasonable and did not represent its will and not its judgment.

The Commission affirmed the hearing officer's award of $2,000 in damages for emotional distress. In addition, the Commission denied the award of $1,000 for punitive damages but stated: "The Commission finds that the record is replete with evidence of emotional harm and awards an additional $1,000 for emotional distress. . ."

The law is very clear that Complainant need not present evidence of medical or psychological treatment. Humiliation can be inferred from the circumstances as well as established by the testimony. *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir. 1974). A plaintiff's testimony regarding personal distress and emotional pain is sufficient proof of injury. *Crawford v. Gamier*, 719 F. 2d 1317 (7th Cir. 1983). Also, the testimony supporting a claim of humiliation or embarrassment need not be greatly detailed. *United States v. Balistrieri*, 981 F. 2d 916, 932 (7th Cir. 1992). However, the record in this case contains substantial evidence of the humiliation and mental anguish suffered by Complainant. In her testimony, Complainant described the physical symptoms she experienced and she testified that as a result of feeling victimized other aspects of her life became dysfunctional-specifically, her attempts to find employment.

Under §68.09(5), Stats., the municipal authority, in this case the MEOC, may affirm, reverse or modify the initial determination. In this case, the Commission both affirmed the initial award of $2,000 for emotional distress and then modified the award by increasing it another $1,000. In doing so, the Commission reviewed the evidence in the record as a whole and determined that Complainant's injury merited an increase in the award. This court concludes that based on the record the conclusion of the Commission was not unreasonable and represented its considered judgment of the evidence and did not represent its will.

VI. Bias

Respondent argues that they did not receive a hearing before and impartial decision maker. This argument is based on the hearing officer's handling of a motion in limine and on certain of the hearing officer's findings of fact. The Commission upheld the hearing officer on both issues.

The motion in limine concerned the admission of testimony of an alderperson as to the intent of the City Council in creating the housing discrimination ordinance. Individual legislators are incompetent to testify as to the intent of the body as a whole. *Ball v. District No. 4*, 117 Wis. 2d 529, 544 (1984). Whether testimony was hearsay or not and whether the hearing officer was inconsistent in making hearsay rulings is irrelevant. The hearing officer included this holding in her reasoning for denying admission of this testimony. The record indicates she also afforded Respondents the opportunity to state their objections to the motion in limine. The Commission affirmed for these same reasons. There is no evidence that the Commission's decision to affirm as arbitrary or unreasonable.

Finally, this court finds there is sufficient evidence in the record to support the Commission's affirmance of the findings of fact to which Respondent takes exception. The commission's decision must be upheld if "reasonable minds could arrive at the same conclusion." *Palleon v. Musolf*, 117 Wis. 2d 469, 473 (Ct. App. 1984). The findings of fact made by the hearing officer and affirmed by the Commission are supported by credible evidence and are conclusive.

Therefore, the court finds that the Commission's determination that the Respondents received a fair and impartial hearing before the hearing officer is reasonable.

ORDER

For all of the reasons state above, the court AFFIRMS the Decision and Order on Remand of the MEOC.

DATED: September 30, 1994

Sarah B. O'Brien, Judge
Circuit Court, Branch 16

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Caryl Sprague 4505 14th Avenue South Minneapolis, MN 55407 Complainant	)	
vs.	)	DECISION AND ORDER ON REMAND
Maureen Rowe 331 1/2 Oakpoint Drive Juneau, WI 53039 Ann Hacklander-Ready 83 Jairus Drive Lexington, KY 40515 Respondent	)	Case No. 1462

The Madison Equal Opportunities Commission (Commission) met on January 13,1994 to consider the Respondents' appeal of the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order in the above-captioned matter. Present and participating in the Commission's decision were: Commissioners Anderson, Gardner, Greenberg, Houlihan, Johnson, Miller, Rodriguez and Wilberg.

BACKGROUND

The Complainant, Caryl Sprague, filed a complaint of discrimination with the Commission on May 25, 1989, and was amended on June 20, 1989, against the Respondents, Maureen Rowe and Ann Hacklander (now Hacklander-Ready). The Complainant alleged that she had been discriminated against because of her sexual orientation when she was denied tenancy in a house at 3122 Lakeland Avenue in Madison, Wisconsin. A Commission Investigator/Conciliator investigated the allegations of the complaint and issued an Initial Determination on August 10, 1989, concluding there was probable cause to believe that the Respondents discriminated against the Complainant because of her sexual orientation in violation of the Equal Opportunities Ordinance, Sec. 3.23(4)(a), Madison General Ordinances (M.G.O.). The parties were offered the opportunity to conciliate the complaint. Conciliation failed and the case was certified for hearing. A public hearing was held on October 14, 1991.

The Hearing Examiner issued her Recommended Findings of Fact, Conclusions of Law and Order on December 27, 1991, finding that the Respondents discriminated against the Complainant by refusing to rent her a room because of her sexual orientation in violation of Sec. 3.23(4)(a), Madison General Ordinances, ordering the payment of compensatory damages to Complainant in the amount of $2,300.00 for a lost security deposit and emotional distress, $1,000 for punitive damages, and reasonable attorney's fees and costs.

The Respondent filed a timely appeal to the Commission.

On July 10, 1992 the MEOC reversed the Hearing Examiner's Order on the narrow jurisdictional issue of whether the Ordinance at the time the complaint was filed prohibited the complained of conduct, stating that "the Commission finds the Ordinance . . . did no prohibit Respondents' action in that 'roommate' transactions were intended to be exempted from coverage under the Ordinance."

On January 8, 1993 Caryl Sprague, by her Attorney, filed a Writ of Certiorari with Branch 16, Dane County Circuit Court Judge Sarah B. O'Brien, appealing the MEOC's Order, seeking a reversal and a ruling that the Ordinance did not prohibit such conduct.

Judge O'Brien entered a Decision and Order in this matter on August 19, 1993 ruling that the Ordinance did prohibit the complained of conduct and remanded this case to the MEOC for consideration of Respondents' exceptions to the Hearing Examiner's decision.

On January 13,1994, the Commission met and considered the Respondents' appeal and issued the decision herein.

DECISION

The MEOC affirms, in part, the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order, and adopts them as its own, except as indicated below, based on the following reasons (The numbering coincides with the Respondents' exceptions as they are numbered):

1. The record lacks any evidence that the Hearing Examiner was biased against the Respondents. In response to each specific exception the Commission states:

a. Deny this exception. The Hearing Examiner has the discretion of hearing arguments on a motion for limine (which is a motion to exclude evidence from being presented at hearing). The Hearing Examiner did not abuse her discretion. She had a reasonable legal basis to render a decision on the motion based on the law as provided her by the Complainant's attorney. Further, the Hearing Examiner did afford Respondents' counsel the opportunity to articulate his objections to the motion at the end of the hearing. Finally, the Respondents were not prejudiced by the Hearing Examiner.

b. Deny this exception. Hearing Examiners may admit hearsay evidence in Administrative Proceedings as long as the hearsay evidence is relevant and material to the issues presented. The Wisconsin Rules of Evidence do not apply to these types of hearings, where a more relaxed standard of evidence admission exists. In addition, the Hearing Examiner permitted the admission of hearsay evidence by both parties over the other's objections.

c. Deny this exception. Respondents do not specifically state what file was admitted without their inspection. The MEOC denies this exception for vagueness.

d. Deny this exception because the record contains sufficient credible evidence for the Hearing Examiner to make this award. Complainant's testimony as to her emotional harm is well supported by Debbie Percival's testimony.

e. Deny this exception as a basis for establishing a claim of bias by the Hearing Examiner.

f. Accept this exception.

2. a. Deny the exception. The record contains more than sufficient credible evidence that Ms. Hacklander, at all times relevant to this case, was the sole lessee to this house and acted as an agent of the owner of the house. By her admission the owner instructed her that she could live there alone or rent to others of her choosing, as long as the full rent was timely paid (See TR at 94, 95).

b. Deny the exception. See 2.a. above.

c. Deny the exception. Ms. Hacklander stated specifically that Ms. Sprague had met "all of their criteria" for a compatible roommate, which is why they offered to rent her the room. (See TR at 164).

d. Deny the exception. The record contains testimony by Ms. Hacklander that Ms. Rowe offered to rent the room to Ms. Sprague, who in turn, accepted the offer in a phone call with Ms. Hacklander. (See TR at 98).

e. Deny the exception. The record contains sufficient credible and unrebuttable evidence to support the Hearing Examiner's finding. More specifically, the record is clear that Ms. Sprague gave Ms. Rowe and Hacklander the security deposit check when she met with them and discussed her sexual orientation. In addition, Ms. Sprague offered evidence, not rebutted by Respondents, that all parties agreed that the sublet would allow the roommates to live together on a trial basis. (See TR at 10).

f. Deny the exception. The record is full of admissions by Respondents that they offered to rent the room to Ms. Sprague. This exception borders on the frivolous.

g. Deny the exception. Again, the record is complete with plenty of admissions by Respondents that the sole and only reason they denied Ms. Sprague housing was because she is a lesbian.

h. Deny the exception. Ms. Rowe testified and wrote a letter to the MEOC stating that she had talked with a new person, who eventually became their roommate, earlier in the day and offered to rent the room to her, pending approval by the other roommates.

i. Deny the exception. The record contains credible evidence to support the findings of facts.

3. The Circuit Court, by Judge Sarah O'Brien, has already addressed this issue.

4. Deny the exception. Sue Bauman's sworn deposition cannot serve as legislative history of Sec. 3.23(4)(a), Madison General Ordinance. The legislative history must be based on a contemporaneous record. Ald. Bauman's testimony was well after the fact and cannot be considered contemporaneous.

5. a. Deny the exception. The record is well established and supports the conclusion that but for the Respondents' discriminatory conduct, Ms. Sprague would not have been forced into the position of trying to secure other living arrangements. This forced her to lose the $300 security deposit.

b. Deny the exception. See l.d. above.

c. Accept the exception on the basis that the evidence does not support punishment to this degree.

d. Deny the exception. The Commission supports the Hearing Examiner's finding of discrimination and therefore adopts the Order awarding attorney's fees and costs.

e. Deny the exception relative to damages for emotional distress. Since punitive damages are denied, the question of whether the Commission has the authority to make such an award is moot.

The MEOC has awarded compensatory damages for emotional harm and distress in at least two previous cases. (See *Nelson v. Weight Loss Clinic of America*, Case No. 20684 (9/29/89), interpreting Sec. 3.23(4)(a) and Rule 17 of the MEOC; *Ossia vs. Rush*, Case no. 1377 (6/7/88)). The Commission has construed the remedial portion of the Ordinance broadly and does so here.

The Commission finds that the record is replete with evidence of emotional harm and awards an additional $1,000 for emotional distress, for a total award of $3,300 for compensatory damages.

f. See Section e above. Furthermore, this Commission concludes that Sec. 3.23(4)(a) Madison General Ordinances fully authorizes it to award damages for emotional distress without affording any party the right to a jury trial. As a

trier of fact the Hearing Examiner is in a good position to assess the existence and extent of emotional damages.

g. Deny the exception. The Commission lacks the authority to rule on constitutional questions and assumes that Sec. 3.23(4)(a), Madison General Ordinances, is consistent with the Wisconsin and United States Constitutions.

6. Deny the exception. The Hearing Examiner has the discretion to articulate those parts of the record she deems relevant as she renders her findings, conclusions and order.

ORDER

The Respondents' appeal is dismissed and the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order, as amended, are entered as the final order of the Commission. The above Commissioners all join in entry of this order.

Signed and dated this 10th day of Feb., 1994

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

BRANCH 16

STATE OF WISCONSIN
ex rel. CARYL SPRAGUE

Plaintiffs,

vs.

CITY OF MADISON, et al,

Defendants.

Petitioner Caryl Sprague brings this action for writ of certiorari to review a decision of the City of Madison Equal Opportunities Commission on her claim of discrimination on the basis of sexual orientation. Respondents include the City of Madison and the Madison Equal Opportunities Commission, and intervening respondents Ann Hacklander-Ready and Maureen Rowe who were the respondents in the original discrimination action from which this review is brought.

The relevant facts are simple and uncontested. Hacklander-Ready rented a four bedroom house from the owner, who was living abroad. She had the owner's permission to allow others to live there with her and to share in the-payment of rent. At the time in question Rowe lived there with Hacklander-Ready. They decided to attempt to find one or two more housemates and advertised in the paper

for others to share the house with them. From numerous applicants they chose the petitioner, Caryl Sprague, as the person to whom they wanted to rent. They told Sprague of their offer and Sprague accepted the offer and on May 4, 1989, left a rent deposit with them. Before and after agreeing to move into the home, Sprague had conversations with Hacklander-Ready and Rowe, including a frank discussion about the fact that she is a lesbian and whether this would impact on the joint living situation. On May 5, 1989, Hacklander-Ready informed Sprague that they were withdrawing their offer to rent to her because they did not want to live with a lesbian. After renting to another woman, they returned Sprague's rent deposit.

Sprague filed a complaint with the Madison Equal Opportunities Commission (MEOC) against Rowe and Hacklander-Ready, alleging that they violated section 3.-23(4)(a) of the Madison General Ordinances by discriminating against her in the provision of housing on the basis of her sexual orientation. The MEOC issued an initial determination finding probable cause to believe that the claimed discrimination occurred. Following a contested hearing an administrative law judge made recommended Findings of Fact, Conclusions of Law and Order concluding that "Respondents discriminated against the Complainant in rental housing when they withdrew their offer to rent a room to her in a rented house because of her sexual orientation in violation of Sec. 3.23(4)(a), M.G.O." The recommended order included provisions for payment of a total of $3300 damages to the complainant by the respondents, together with costs and reasonable attorney's fees. The Respondents appealed to the Equal Opportunities Commission and on July 10, 1992, the Commission vacated the hearing examiner's recommended Findings of Fact, Conclusions of Law and Order. The Commission based its order on its finding that the ordinance in effect at the time in question was inapplicable

because "'roommate' transactions were intended to be exempted from coverage under the Ordinance." This action for certiorari followed.

APPLICABLE ORDINANCES

At the time of the events in question, relevant portions of the Madison General Ordinances read as follows:

> 3.23(1) Declaration of Policy. The practice of providing equal opportunities in housing ... without regard to ... sexual orientation ... is a desirable goal of the City of Madison and a matter of legitimate concern to its government.... In order that the peace, freedom, safety and general welfare of all inhabitants of the City may be protected and ensured, it is hereby declared to be the public policy of the City of Madison to foster and enforce to the fullest extent the protection by law of the rights of all of its inhabitants to equal opportunity to ... housing ....
>
> 3.23(2)(b) "Housing" shall mean any building, structure, or part thereof which is used or occupied, or is intended, arranged or designed to be used or occupied, as a residence, home or place of habitation of one or more human beings, including a mobile home as defined in Section 66.058 of the Wisconsin Statutes and a trailer as defined in Section 9.23 of the Madison General Ordinances... Such definition of "housing" is qualified by the exceptions contained in Section 3.23(4)(a).
>
> 3.23(4) It shall be an unfair discrimination practice and unlawful and hereby prohibited: (a)

> For any person having the right of ownership or possession or the right of transfer, sale, rental or lease of any housing, or the agent of any such person, to refuse to transfer, sell, rent or lease, or otherwise to deny or withhold from any person such housing because of ... sexual orientation ...
>
> (b) Nothing in this ordinance shall prevent any person from renting or leasing housing, or any part thereof, to solely male or female persons if such housing or part thereof is rented with the understanding that toilet and bath facilities must be shared with the landlord or with other tenants

In September, 1989, after the actions occurred which petitioner alleges were discriminatory, the Madison City Council amended the Equal Opportunities Ordinance by adding the following section:

> 3.23(c) Nothing in this ordinance shall affect any person's decision to share occupancy of a lodging room, apartment or dwelling unit with another person or persons. For purposes of this subdivision, the terms lodging room, apartment, and dwelling unit have the meaning contained in Sec. 27.03 of these ordinances.

DISCUSSION

The court's review on certiorari is limited to the following four questions:

(1) Whether the Commission kept within its jurisdiction;

(2) Whether it acted according to law;

(3) Whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and

(4)Whether the evidence was such that the Commission might reasonably make the determination in question.

State v. Goulette, 65 Wis. 2d 207, 215, 222 N.W. 2d 622 (1974). This action is determined based on my conclusion that the Commission failed to act according to law in its decision. The Commission's decision is extremely brief. After a condensed recitation of the facts the order opines that the rejection of petitioner as a roommate based on her sexual orientation was morally objectionable, but that it was not legally wrong because roommate transactions were intended to be exempted under the ordinance. The decision provides no basis for its conclusion, nor any discussion of the legal arguments raised by both parties. It constitutes a faulty interpretation of the law.

The commission may go behind the language of the law and attempt to discern the intent of the adopters of the law only if it first concludes that the ordinance in question is ambiguous. *State v Martin*, 162 Wis. 2d 883, 470 N.W. 2d 900 (1991). The Commission made no such finding that the ordinance is ambiguous, nor could it. Its conclusion based on the alleged intent of the ordinance's creators is therefore invalid.

The language of the ordinance is crystal clear. At the time of the events herein, discrimination was prohibited in the transfer, sale, rental or leasing of any housing, by a person with right of ownership or possession or the agent of such person. Housing was defined as including any building, structure or part thereof to be occupied as a residence by one or more human beings. There was only one exception: that

contained in Sec. 3.23 (4)(b) allowing rentals to only one sex if the tenants used a shared bathroom.

The language of the ordinance is very inclusive. Not only does it say it applies to any type of transfer, it also applies to any type of housing. The words chosen in drafting the ordinance are those which apply to the widest possible circumstances. And the Declaration of Policy set forth in sec. 3.23(1) M.G.O. emphasizes that the policy of the City was to enforce equal housing opportunity for all Madison residents to the fullest extent of the law. There is nothing unclear or confusing, nothing ambiguous, about the ordinance.

And so, by law, the analysis stops there. It is improper to attempt to determine what the intent of the city council might have been in adopting the ordinance. This court declines the invitations of respondents to do so. The purpose of the courts is not to sit as super-legislatures, second-guessing the acts of our elected officials, unless the acts are clearly illegal.

There can be no genuine question raised about whether the unambiguous language of the ordinance applied to the intervening respondents here. They had rented the house with the understanding they could sublease to additional housemates. Thus they clearly were persons with the rights of possession and transfer, and were acting as agents of the owner at the time they offered to sublease to petitioner. The feet that their shared home constitutes "housing" under the Madison ordinance is similarly clear. Housing includes all or any part of any building occupied as a residence by one or more persons. It cannot seriously be contended that sharing use of a house does not come within this broad definition. The sole exception to the fair housing code, that rental of facilities with shared bathrooms can be restricted to one sex, allowed respondents to refuse to rent to

men, but not to refuse to rent to individuals in any of the other protected classifications.

Respondents contend that weight should be given to the decision of the Commission, pointing out that Wisconsin courts generally defer to the reasonable interpretations of agencies charged with administration of ambiguous legislation.

Weight to be given to the decision of an administrative agency is determined by principles set forth in *Local No. 695 v LIRC*, 152 Wis. 2d 75 82-84, 452 N.W. 2d 368 3712 (Wis. 1990) and *Consol. Freightways v Department of Revenue*, 157 Wis. 2d 65,458 N.W. 2d 550, (Wis. App. 1990). In the absence of evidence that the agency's interpretation of a particular law is long-standing, substantially uniform and without challenge by governmental authorities and courts, the weight to be given an agency interpretation is no weight at all. The conclusion of the Commission in this matter is not long-standing as it is apparently conceded that this is a case of first impression for the MEOC. Nor is the Commission's decision without challenge in the courts. The decision is contrary to the conclusion of Judge John W. Reynolds in a federal civil rights action which required interpretation of a shared housing/sublease situation virtually identical to the one here. *Koehler v Koepke*, Civil Action No. 87-C-130 (E.D.WI 1987). In that case Judge Reynolds concluded that where the renter of an apartment enters into an agreement with another to share the living space in exchange for payment of rent, the original tenant becomes the new tenant's landlord as well as roommate, and fair rental laws apply. I give no weight to the clearly erroneous conclusion of the Commission.

CONCLUSION

The Commission's decision is reversed. The ordinance which was in effect at the time that petitioner was denied housing was applicable to shared housing situations. (It has since been amended by the City Council to exclude shared housing situations.)

Respondents Rowe and Hacklander-Ready ask that the matter be remanded to the Commission for consideration of several exceptions they had made to the terms of the recommended order which were not reached by the Commission because of its conclusion that the ordinance was inapplicable in this situation. It is appropriate to remand in order to give the Commission the opportunity to review those issues prior to any court review. *Omernick v DNR*, 100 Wis. 2d 234, 301 N.W. 2d 437 (1981), *Kuechmann v LaCrosse School District*, 170 Wis. 2d 218, 487 N.W. 2d 639 (1992) Ct. App. This court will retain jurisdiction to complete the certiorari review if a timely request is made following issuance of the Commission's decision.

DATED: August 19, 1993

BY ORDER OF THE COURT:

Sarah B. O'Brien, Judge
Circuit Court, Branch 16

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Caryl Sprague 4505 14th Avenue South Minneapolis, MN 55407 Complainant vs. Maureen Rowe 331 1/2 Oakpoint Drive Juneau, WI 53039 Ann Hacklander-Ready 83 Jairus Drive Lexington, KY 40515 Respondents	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER Case No. 1462

A complaint of discrimination on the basis of sexual orientation was filed with the Madison Equal Opportunities Commission (E.O.C.) on May 25 1989 and was amended on June 20, 1989, Pursuant to the complaint. an investigation of the matter was conducted by an E.O.C Investigator/Conciliator. Following the investigation, an Initial Determination was issued on August 10, 1989 which

concluded that there is probable cause to believe that the Respondents discriminated against the Complainant because of her sexual orientation in violation of the Equal Opportunities Ordinance, sec. 3.23(4)(a), Madison General Ordinances (M.G.O.). Conciliation of the discrimination complaint was attempted but was unsuccessful and the case was certified for hearing.

The hearing was held before an E.O.C. hearing examiner on October 14,1991 in Madison. The Complainant appeared in person and was represented by Attorney T. Christopher Kelly. The Respondents also appeared in person and were represented by Attorney Bruce M. Davey. The parties were to file post hearing briefs by November 11, 1991. The Complainants brief was timely filed. The Respondents brief was received on November 19, 1991 and was accepted upon a showing by their attorney that the brief had been misaddressed and had been returned to the sender by the Post Office before being correctly readdressed to the E.O.C..

Having reviewed the hearing evidence and considered the post hearing briefs filed by the parties, I now make the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is a single, adult female whose sexual orientation is lesbian.

2. The Respondents are adult, heterosexual females who, at all times relevant herein, shared a four bedroom, two bathroom rented house on Lakeland Avenue in Madison. The owner of the house was temporarily living abroad at that time. The rent was $740.00 per month.

3. During the pendency of this matter all of the parties moved out of Madison and Ann Hacklander Ready (hereinafter Hacklander) married.

4. Hacklander was the sole signator on the house lease and had the authority from the owner to rent space in the house to additional persons if she chose to do so: The lease term was for one year, from August 24, 1988 to August 23, 1989. Hacklander and another woman were lessees of the same house the previous year when two additional women joined them in sharing the house and the rent. Except for Hacklander, all of the women who had shared the Lakeland Avenue house with her during the 1987-88 lease term had moved out by May 1989. The Respondent Maureen Rowe (hereinafter Rowe) came to live in the house in the fall of 1986. She was a friend of one of the previous residents of the house. Up to that time the various occupants of the house had come to share the house by way of being friends of an occupant or through word of mouth referral.

5. In April 1989, Hacklander placed advertisements in local newspapers for one or two women to share the rental of the Lakeland Avenue house after two then current roommates gave notice that they would be moving out. Neither she nor Rowe knew of any friends or friends of friends who might wish to share the rented house at that time.

6. On April 30, 1989, the Complainant, who was seeking rent shared housing in a convenient location, answered Hacklander's ad in the Wisconsin State Journal which offered a May-August sublease with "fall lease possible".

7. The same day the Respondents had a lengthy face to face, mutual interview with the Complainant at the house.

They emphasized that they were seeking a compatible working woman to share the house. They discussed such things as work schedules, habits and friends. They did not wish to share the house with women who smoked, used drugs or liked to party late at night.

8. At the end of the interview on April 30th, the Respondents told the Complainant that they intended to interview other potential roommates after which they would let her know what they had decided regarding her moving into the house. They indicated that although Hacklander was in charge of the rental and had the final decision making authority for selecting roommates, she would seek input from the other occupants of the house.

9. After interviewing approximately twelve other women, the Respondents decided that they would ask the Complainant to share the rented house with them. They felt that she was a nice person who best fit their criteria for a roommate and would be compatible with them.

10. On may 4, 1989, Rowe phoned the Complainant and told her that she, Rowe, and Hacklander felt that the Complainant would be a compatible roommate and invited her to rent the vacant room in the Lakeland Avenue house. The Complainant answered that she would call back during that weekend to let the Respondents know what she had decided to do.

11. A few days later Hacklander phoned the Complainant and asked whether she had made up her mind about moving into the house. During that conversation, the Complainant asked if a person's sexual orientation was respected by the occupants of the house. Hacklander replied that she and Rowe had suspected that the Complainant was a lesbian and assured her that was all right with them.

12. The Complainant decided to move into the Lakeland Avenue house. On May 4, 1989, she visited the house and gave Rowe a deposit check of $175.00, the amount of one month's rent. At that time Rowe, and at some point Hacklander, had some further discussion regarding the Complainant's sexual orientation. It was agreed between the Complainant and the Respondents at that time that the Complainant's three month summer tenancy in the house would be a trial period to see how things worked out. The Complainant mentioned to the Respondents that she would not wish to live house in which a person's sexual orientation is not respected.

13. The following day, May 5, 1989, the Respondents withdrew the offer to rent to the Complainant because of her sexual orientation. Rowe phoned the Complainant and told her that although she and Hacklander had no objections to the fact that the Complainant is a lesbian, a new roommate, Mickey, who had not yet moved into the house, objected to living in the house with a lesbian because it would make her uncomfortable; and if Mickey was uncomfortable Rowe would be uncomfortable as well.

14. Rowe's statement regarding Mickey's objection to the Complainant as a roommate is untrue. She has acknowledged that she had not spoken to Mickey regarding this matter and that it was she who thought she would be uncomfortable and did not wish to live in the house with a lesbian. Hacklander, who had no objection to having a lesbian share the house, deferred to Rowe's wishes in order to prevent potential tension from arising in the house. Rowe did not wish to live with a lesbian in the house because she felt that "it would be like living with a man."

15. The sole reason that the Complainant was rejected as a roommate by the Respondents was because she

is a lesbian. That reason was confirmed by Hacklander to the Complainant when she went back to the Lakeland Avenue house to retrieve her deposit check.

16. The room that had been reserved for the Complainant was rented to another woman of unknown sexual orientation before the Complainant's deposit had been returned to her.

17. Mickey was never consulted about renting a room to the Complainant or to the woman who was selected as a roommate following the Complainant's rejection by the Respondents, notwithstanding Hacklander's stated policy of consulting all occupants regarding the selection of new roommates.

18. The Complainant had difficulty in securing satisfactory housing after she was denied rental housing by the Respondents. She had to place her belongings in storage/ lived out of her car or stayed with friends during a two week period, sublet an apartment from June 15. August 15, 1989 and lost a security deposit of $300.00 after she was unable to secure a hoped for roommate to share an apartment at Brighton Square Apartments where the rent was $300.00 per month. She finally obtained housing as of September 1, 1989 at a rent of $200.00 per month.

19. Following her rejection as a roommate by the Respondents, the Complainant experienced periods of crying, depression and difficulty in concentrating on finding new employment after she was laid off from her job as an Occupational Therapist in June 1989. She had feelings of humiliation and felt herself to be under considerable emotional distress. 20. The Complainant did not seek counseling or medical treatment after her encounter with the

Respondents and did not keep records of her out of pocket expenses for the period up to September 1989.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is an adult female whose sexual orientation is lesbian. She is thereby a member of a protected class under sec. 3.23(4)(a), M.G.O. which prohibits discrimination in rental housing on the basis of sexual orientation, among other categories.

2. The Respondents are adult heterosexual females who had the right of rental housing within the meaning of sec.3.23 (4)(a), MGO, at all times relevant herein.

3. The Respondents discriminated against the Complainant in rental housing when they withdrew their offer to rent a room to her in a rented house because of her sexual orientation in violation of sec. 3.23(4)(a), M.G.O.

RECOMMENDED ORDER

1. The Respondents shall pay the Complainant, the sum of Three Hundred dollars ($300.00) for her lost security deposit to the Brighton Square Apartments.

2. The Respondents shall pay the Complainant the sum of Two Thousand dollars($2,000.00) in damages for emotional distress.

3. The Respondents shall pay the Complainant the sum of One Thousand dollars ($ 1,000.00) in punitive damages.

4. The Complainant is awarded costs and reasonable attorney's fees. She shall file a petition for the same with the

E.O.C. together with all supporting affidavits and documents and serve copies of each upon the Respondent within thirty days of the date of this Order.

MEMORANDUM DECISION

The O.E.C. Ordinance in effect at the time this complaint was filed and upon which this decision is based, made unlawful the refusal by any person having the right of possession or the right of rental or lease of any housing to refuse to rent or lease or otherwise deny or withhold from any person such housing because of, among other characteristics, a person's sexual orientation.

There is no dispute that Hacklander was the sole lessee of a large, four bedroom house in Madison which was owned by a man living abroad who had given her the authority to rent out space in the house persons of her choosing. In effect, all but Hacklander were subtenants in the shared house.

It is also undisputed that after first offering to rent housing to the Complainant, and after accepting her deposit check of one month s rent ($175.00), the Respondents withdrew their offer after it was confirmed to them that the Complainant is a lesbian.

The Respondents argue that sec. 3.23 (4)(a), M.G.O. is not clear and unambiguous with regard to shared living arrangements which they allege are unusual and therefor not meant to be subject to the Ordinance. However, such arrangements are fairly common in Madison, a university city with a large number of people in their 20's and 30's who are students or young professionals who often seek such affordable housing arrangements. The Madison City Council must surely have been aware of shared housing rentals when

they passed the Ordinance and chose not to exempt them from the prohibitions of sec. 3.23 (4)(a). In sec. 3.23 (4)(b) of the Ordinance, the Council did choose to specifically exempt same sex shared housing rentals from the prohibitions of the Ordinance if toilet and bath facilities must be shared with the landlord or other tenants. Accordingly, the E.O.C. has interpreted sec. 3.23(4)(a), M.G.O. to include any housing, of whatever arrangement except those specifically excluded in the Ordinance in effect at the time this complaint was filed.

Even if it is assumed, for the sake of argument, that sec. 3.23(4)(a), M.G.O. is ambiguous, i.e., If reasonable persons could disagree as to its meaning, *Kollasch v. Adamany*, 104 Wis. 2d 552, (1981), the Wisconsin Appeals Court generally defers to the reasonable interpretation of the agency charged with the administration of ambiguous legislation. *Milo v. Lindner*, 96 Wis. 2d 624(1980). Hence, sec. 3.23(4)(a), M.G.O. is reasonably interpreted by the E.O.C. to encompass any housing, as stated.

The Respondents' claim of constitutional protection here for their right to privacy and freedom of association is not supported by the evidence. The application of the prohibitions of the Ordinance to the Respondents in no way restricted their ability to seek roommates to share their rented house by inviting friends or women referred by friends to do so, as Hacklander had done for the previous lease term (1987-88). However, when they entered the public market place by advertising for unknown women to live with them, the resulting relationships lacked the requisite degree of intimacy required for the constitutional protection they claim.

In *Rotary Club of Duarte v. International Rotary Club*, 481 U.S. 537 (1987), the Supreme Court held that the test for constitutional protection of freedom of association is

whether the association is sufficiently intimate or private to warrant such protection. "This entails an assessment of where the relationship's objective characteristics locate it on a spectrum of the most intimate to the most attenuated of personal attachments." *Id.* at 546. In this case, the relationship of the Respondents to two subtenants was neither the most attenuated nor the most intimate. The fact that Hacklander placed newspaper advertisements soliciting strangers to sublet rooms in the house she had leased places the resulting relationships somewhat closer to the attenuated side of the spectrum than to the intimate side.

At the time this matter arose in early May 1989, only the Respondents were friends. The Complainant and the woman who replaced her when the Respondents withdrew their offer to rent to the Complainant were strangers to both of the Respondents, as was the new subtenant Mickey, who moved out after three weeks of living in the shared house. There was no evidence presented indicating any particular personal attachments or close ties between the Respondents and the various roommates who moved in or out of the house between the fall of 1987 and the time of the Complainant's rejection by the Respondents' notwithstanding that the roommates sometimes ate meals together at the house on weekends and shared household chores. There was no indication that they purchased food in common or otherwise functioned as a household unit.

Both Respondents had considerable experience in living in shared housing. Each had some unpleasant experiences with such arrangements for a variety of reasons. It is therefore understandable that they would seek to prevent negative situations from arising again by carefully screening prospective roommates who responded to the newspaper advertisements to share the Lakeland Avenue rented house. Nevertheless, they sought strangers as roommates by entering

the marketplace, admittedly to gain an economic benefit by reducing their share of the $740.00 per month rent for the house. Consequently, I find that there was no intimate relationship subject to constitutional protection for the right of free association. In *Hishon v. King and Spaulding*. 467 U.S. 69,(1984), the Court found that a law firm did not have immunity from employment discrimination laws and rejected its claim of constitutional right to freedom of association for alleged gender-based discrimination in partnership decisions for associates. To the extent that the Respondents solicited strangers to live with them in order to secure an economic benefit, the matter may be viewed as a commercial transaction not entitled to constitutional protection of the First Amendment.

"The proper approach to First Amendment claims of associational freedom is... to distinguish nonexpressive from expressive associations and to recognize that the former lack the full constitutional protections possessed by the latter." *Roberts v. Jaycees*, 468 U.S.609, (1984). Inasmuch as the associations involved in this case were nonexpressive, i.e., not for the purpose of engaging in religious, political party, labor union or social issue activities, for example, or for pursuing some common endeavor they were not subject to First Amendment protection.

With respect to the Respondents' claim of a constitutional right of privacy, absent the degree of intimate relationships necessary for constitutional protection of freedom of association, there is no basis for the protection of their right of privacy which generally has been accorded protection in instances involving intimate decisions such as the right to acquire and use contraceptives, the right to bear children and the right to have an abortion. In terms of privacy in general, each roommate in the Lakeland Avenue

house had her own private bedroom in which to protect and enjoy daily privacy to the extent each desired.

Damages

The Equal Opportunities Ordinance provides that where the Commission finds that discrimination has occurred, 'it shall order such action by the Respondent as will redress the injury done to the Complainant in violation of this ordinance... " sec.3.23 (9}(c)2.b., M.G.O. E.O.C Rule 17 expressly authorizes compensatory damages for discrimination as follows:

> Compensatory losses' reasonable attorney fees and costs may be ordered along with any other appropriate remedies where the Commission finds that a Respondent has engaged in discrimination.

This rule does not by express reference to compensatory losses, attorney fees and costs-limit in any way the Commission s authority to order any other remedies permitted or required under sec. 3.23, Madison General Ordinances.

Victims of housing discrimination may recover damages for emotional distress which may include humiliation and mental anguish. *Chomicki v. Wittekind*, 128 Wis. 2d 186. The victim's testimony alone is sufficient to establish emotional distress. *Id.* at 201. The Complainant testified as to her feelings of humiliation, her crying spells and her inability to concentrate after she had been rejected as a roommate by the Respondents., thus establishing her emotional distress which continues to the present with feelings of sadness and hurt from her experience with the Respondents. Her testimony was credible and in consideration of her emotional

distress, an award of $2,000.00 as compensatory damages is appropriate.

The Complainant also is seeking punitive damages which may be awarded when a plaintiff proves by clear and convincing evidence that a defendant's conduct was willful or wanton, in reckless disregard of the plaintiff s rights or interests. *Brown v. Maxey*, 124 Wis.2d 426. The Respondents, after first offering to rent a room to the Complainant, accepting her deposit to secure the rental and assuring her that her sexual orientation would be respected in the house, blatantly lied to her that an absent roommate did not wish to live with a lesbian and therefore they were withdrawing their offer to rent to her. They had already rented the room reserved for the Complainant before they informed her that she had been rejected although they had found her to be compatible after a lengthy interview with her when she responded to the advertisement for a roommate. I find the evidence clear and convincing that the Respondents conduct was conscious and willful and was in total disregard of the Complainant's civil rights. Accordingly, an award of $1,000.00 in punitive damages for the Complainant is appropriate.

The Complainant kept no record of nor receipts for out of pocket expenses she incurred while seeking appropriate housing after her rejection by the Respondents. Her testimony was somewhat vague regarding those expenses. She did offer her canceled checks totaling $300.00 Which amount she was unable to get refunded when an apartment rental fell through. Under those circumstances, her award for out of pocket expenses shall be limited to $300.00. Her rent of $200.00 per month beginning September 1, 1989 is not relevant to any award for damages since she and the Respondents had agreed to a three month trial rental period for her ending before September 1st.

Dated at Madison this 27th day of Dec., 1991.

EQUAL OPPORTUNITIES COMMISSION

Sheilah O. Jakobson
Hearing Examiner